

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CERTAIN INTERESTED)
UNDERWRITERS AT LLOYDS,)
)
Plaintiff,)
)
v.)
)
BARRIDOFF GALLERIES et al.,)
)
Defendants.)

Civil No. 03-191-P-S

**MEMORANDUM OF DECISION ON MOTIONS TO STRIKE AND
RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT**

Certain Interested Underwriters at Lloyds ("Lloyds") pursues through subrogation claims against Barridoff Galleries, Dhyana Enterprises d/b/a Mail Boxes, Etc., and Earle W. Noyes & Sons, for damage to an Edwin Lord Weeks painting, *The Sheik of the Caravan at Prayer, Evening*, that was purchased by Lloyds's subrogor from Barridoff Galleries and remained in the possession of Barridoff Galleries and its agents for a time before being packed and shipped on behalf of Lloyds's subrogor by Earle W. Noyes & Sons and Dhyana Enterprises, respectively. The defendants have moved for summary judgment on the ground that there is no evidence of negligence on their part. I recommend that the court deny the motions of Dhyana Enterprises and Earle W. Noyes and grant Barridoff Galleries's motion.

Statement of Facts

The material facts in this case concern the condition and movement of *The Sheik of the Caravan at Prayer, Evening*, from its initial consignment with defendant Barridoff Galleries in Portland, Maine, at which time it was undisputedly in an undamaged condition, through its sojourn among the defendants (from the home of Annette Elowitch, one of the owners of

Barridoff Galleries, to the auction, then back to Ms. Elowitch's home, then to Mail Boxes, Etc., then to Earle W. Noyes and Sons, then back to Mail Boxes, Etc., then to Federal Express), to its eventual arrival at the premises of Lloyds's subrogor, the Richard Green Group of London, England, by which time it had received a 13-inch tear on the canvas. All of the defendants' statements of fact provide information regarding certain aspects of *The Sheik's* voyage. Other aspects of the voyage are described in more or less detail in the papers associated with specific motions. I trace its voyage among the parties in chronological fashion, attempting to focus on the summary judgment papers of that defendant whose care or custody of *The Sheik* is at issue.

From Barridoff Galleries

In the spring of 2000, defendant Barridoff Galleries received on consignment *The Sheik of the Caravan at Prayer, Evening*, by Edwin Lord Weeks, which was sold at auction in August 2000. (Docket No. 77, ¶ 4.) Between spring and August 2, 2000, *The Sheik* was on display on the wall of Annette Elowitch's home in Portland, Maine, but for one day when it was taken to another location for photographing and the two days on which it was transported to, remained at and returned from the auction site. (Docket No. 77, ¶¶ 7, 10, 12, 16.) Ms. Elowitch is an owner of Barridoff Galleries. (Docket No. 77, ¶ 7.) The individual who photographed *The Sheik* and was responsible for transporting *The Sheik* to and from auction was Jay York. (Docket No. 77, ¶¶ 7-10, 12.)

Richard Green Group of London, England, purchased the painting at auction for \$140,000. (Docket No. 77, ¶¶ 1, 13.) Pursuant to an agreed upon arrangement between Barridoff Galleries and the Richard Green Group, Barridoff Galleries maintained possession of *The Sheik* pending the receipt of shipping instructions from the Richard Green Group. (Docket No. 77, ¶ 15.) Accordingly, Mr. York returned *The Sheik* to the wall of Ms. Elowitch's home

until shipping instructions were received from the Richard Green Group. (Docket No. 77, ¶¶ 16-17.) Upon the advice of Barridoff Galleries, the Richard Green Group decided to ship *The Sheik* and another painting it won at auction through Mail Boxes, Etc., and Federal Express. The Richard Green Group requested that Barridoff Galleries instruct Mail Boxes, Etc., to fax its quote/invoice so that the Richard Green Group could pay Mail Boxes, Etc., for its services. (Docket No. 77, ¶¶ 18-20; Docket No. 95, ¶¶ 18-20.)

After Barridoff Galleries received shipping instructions, Ms. Elowitch "instructed" one Deidre Nice to deliver the painting to Mail Boxes, Etc., a "d/b/a" of defendant Dhyana Enterprises. (Docket No. 77, ¶¶ 22, 23; Docket No. 53, ¶ 38.) Barridoff Galleries had an established relationship or "customary arrangement" with Mail Boxes, Etc., when it came to how paintings ought to be shipped. Mail Boxes, Etc., would transport paintings to defendant Earle W. Noyes & Sons to have them specially crated for shipment. The crated paintings would then be returned to Mail Boxes, Etc. Thereafter, Mail Boxes, Etc., would arrange for Federal Express to ship paintings pursuant to shipping instructions supplied by Barridoff Galleries. (Docket No. 95, ¶¶ 27.) The Richard Green Group agreed to this arrangement. David Saker, the employee of the Richard Green Group who was responsible for making arrangements for shipment of *The Sheik* to England (Docket No. 80, ¶ 21), authorized Barridoff Galleries to have *The Sheik* delivered to Mail Boxes, Etc., for packing and shipment, informed Barridoff Galleries that shipment was to go through Federal Express because the Richard Green Group does all of its shipping from the United States through, and has an account with, Federal Express, and requested that Barridoff Galleries ask Mail Boxes, Etc., to fax a "quote/invoice" for its services directly to the Richard Green Group. (Docket No. 97, ¶ 23; Docket No. 95, Ex. D.) Mr. Saker forwarded all of the relevant details, including the shipping address, the Richard Green Group's Federal Express

account number and contact information for specific Federal Express personnel in Chicago who would arrange for pick up. (Docket No. 95, Ex. D.)

When Barridoff Galleries received the *The Sheik* on consignment, it was in an undamaged condition. (Docket No. 77, ¶ 5.) At no time while in the care, custody or control of Barridoff Galleries or its agents, including several months during which it was displayed in Ms. Elowitch's home, was *The Sheik* crated, wrapped, or otherwise hidden from view. (Docket No. 77, ¶¶ 11, 16, 17, 24.) According to Ms. Elowitch, *The Sheik* was not damaged before leaving her premises. (Docket No. 77, ¶ 34.)

To Dhyana Enterprises, Inc., d/b/a Mail Boxes, Etc.

Defendant Dhyana Enterprises, Inc., d/b/a Mail Boxes, Etc., received *The Sheik*, along with another painting won at auction by the Richard Green Group, around August 14, 2000, most likely a few days prior. (Docket No. 87, ¶ 1; Docket No. 99, ¶ 1; Kurzmann Depo. at 50.) Mail Boxes, Etc., understood that the paintings were to be crated and shipped to the Richard Green Group in London, England, because those were the instructions provided by both Barridoff Galleries and the Richard Green Group. (Docket No. 87, ¶¶ 1, 2; Docket No. 99, ¶ 1.) According to Neil Kurzmann, an officer of Dhyana Enterprises's Mail Boxes, Etc., store, he received the paintings unwrapped and undamaged. (Docket No. 87, ¶ 2; Docket No. 99, ¶ 5; Kurzmann Depo. at 61.¹) Mr. Kurzmann subsequently transported the paintings to Earle W. Noyes & Sons to be crated for shipment. (Docket No. 87, ¶ 4.)

¹ Although not expressly stated by either Dhyana Enterprises or the plaintiff, the portions of Mr. Kurzmann's deposition testimony cited in the plaintiff's statement of material fact reflect contradictory testimony on the part of Mr. Kurzmann. At one point, Mr. Kurzmann testified that he would have placed the paintings in cardboard boxes before bringing them to Noyes, because that is what he always did with unpackaged paintings such as these two. (Kurzmann Depo. at 61.) At a later point in his deposition, Mr. Kurzmann testified that he "wrapped" the paintings before bringing them to Earle W. Noyes & Sons. (Kurzmann Depo. at 90.)

To Earle W. Noyes & Sons

On or about August 14, 2000, Earle W. Noyes & Sons ("Noyes") received the subject paintings from Mail Boxes, Etc. (Docket No. 80, ¶ 1.) According to Carlton Hurd, a Noyes employee, he assisted in unloading the paintings. (*Id.*, ¶ 2.) Also according to Mr. Hurd, the paintings were unwrapped and undamaged when they arrived at Noyes.² (*Id.*, ¶¶ 2, 4.) Mr. Hurd proceeded to crate the paintings. According to Mr. Hurd, the normal procedure when crating a painting is to wrap the painting in a sheet of brown and blue padded Kraft paper, insert it into a telescoping cardboard box, insert the cardboard covered painting into a wooden crate, singly or with others, cushion the spaces between the cardboard box and crate with crumpled newsprint, and seal the wooden crate with screws.³ (*Id.*, ¶¶ 12-16.) Mr. Hurd has no specific recollection of *The Sheik*, despite being shown a photograph of it. (Docket No. 97, *passim* & ¶¶ 37-40 additional; Docket No. 116, ¶ 37.)

Back to Dhyana Enterprises's Mail Boxes, Etc., store

After crating by Noyes, *The Sheik* returned to Dhyana Enterprises's Mail Boxes, Etc., store, where it remained for a few hours until Federal Express picked it up. (Docket No. 87, ¶ 6; Docket No. 99, ¶ 6.) While awaiting pick up by Federal Express, Mr. Kurzmann affixed a shipping label to the crate that had been provided to him, partially filled out, by Barridoff Galleries. (Docket No. 95, ¶¶ 53-54; Docket No. 113, ¶ 53; Docket No. 99, ¶ 17.) In addition, Mr. Kurzmann affixed certain customs paperwork to the crate that had been provided to Mail Boxes, Etc., by the Richard Green Group via Barridoff Galleries. (Docket No. 95, ¶ 53; Docket No. 113, ¶ 53; Docket No. 99, ¶ 18; Docket No. 121, ¶ 18.) As the party finally placing the crate

² Again, reviewing the deposition transcript reflects facts not offered by the parties in their statements of material facts. In particular, Mr. Hurd's deposition testimony is to the effect that paintings from Mail Boxes, Etc., arrive unwrapped "all the time." (Hurd Depo. at 20.)

³ It is undisputed that *The Sheik* was at least wrapped in Kraft paper and placed inside a wooden crate before shipment to the Richard Green Group.

in the possession of Federal Express, Mr. Kurzmann was required to fill out an International Air Waybill presented by Federal Express. (Docket No. 99, ¶ 25.) Mr. Kurzmann inserted the name of Barridoff Galleries but the physical address of Mail Boxes, Etc., in the "from" or shipper area of the waybill. (Docket No. 95, ¶ 55; Docket No. 113, ¶ 55; Docket No. 99, ¶ 29; Docket No. 121, ¶ 29.)

To Federal Express

Few details of *The Sheik's* voyage from Portland to London are provided. The record reflects that *The Sheik* traveled overseas by air. (Docket No. 99, ¶ 25; Docket No. 97, Ex. 2 at 68-69.) It is undisputed that *The Sheik* was temporarily in the custody of customs after its arrival in the United Kingdom. (Docket No. 80, ¶¶ 34-35; Docket No. Docket No. 97, ¶ 34-35; Docket No. 99, ¶ 8.) Whether the crate was opened and whether *The Sheik* was unwrapped or damaged while in the possession of either Federal Express or customs is unknown. For purposes of the pending summary judgment motions, the appropriate inference is that *The Sheik* was not damaged by Federal Express or U.K. customs.

To the Richard Green Group

Guy Sawers, the employee at the Richard Green Group who received and opened the crate containing *The Sheik*, testified at his deposition that the paintings in the crate were wrapped in the brown/blue paper described by Mr. Hurd, with the canvas side of each painting facing inwards and with a piece of cardboard, slightly larger than *The Sheik's* "frame aperture," separating them. (Docket No. 37, ¶ 35; Docket No. 80, Ex. 2 at 32-33, 36.) Mr. Sawers cannot recall whether there was additional cardboard between the paintings and the walls of the crate. (Docket No. 80, Ex. 2 at 38-39.) Upon inspecting the paintings, Mr. Sawers discovered that *The Sheik* was damaged with a long tear or rip on the canvas. (Docket No. 80, Ex. 2 at 160-61.) The

tear does not extend through the entire thickness of the canvas but exposes the underlying canvas fibers. (Docket No. 80, ¶ 30.) A picture of the damaged area of the canvas is available in the record. (Docket No. 81, Ex. B.)

Motions to Strike

Lloyds has moved to strike the affidavits of Neil Kurzman, offered by Dhyana Enterprises, and Carleton Hurd, offered by Earle W. Noyes. (Docket Nos. 100 & 101.) Lloyds complains that the affiants offer specific testimony about *The Sheik* and their care and custody of it, but had previously testified during depositions that they had no appreciable recollection of *The Sheik*. Although there is some tension between the deposition testimony and the affidavits, that does not mean that the affidavits must be stricken. Lloyds has adequately called the court's attention to the discrepancies and it is appropriate for the court to give greater weight to the deposition testimony to the extent that it favors Lloyds, because Lloyds is the summary judgment non-movant. Furthermore, the jury would not be required to believe the statements offered by Mr. Kurzman and Mr. Hurd in their affidavits, were the testimony introduced at trial, particularly as they are both interested witnesses and their prior deposition testimony tends to call into question the reliability of their more specific statements. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000) (“[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.’”). In other words, there is already built into the summary judgment system a method for handling the concerns raised by Lloyds. Accordingly, I **DENY** the motions to strike.

Summary Judgment Discussion

A movant is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to the nonmovants and I indulge all reasonable inferences in their favor. See Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 276 (1st Cir. 2003).

The operative pleading in this case is Lloyds's second amended complaint. The complaint lists the following seven causes of action:

1. A claim of negligence against Barridoff Galleries;
2. A claim of negligence against Earle W. Noyes & Sons;
3. A claim of negligence against Dhyana Enterprises;
4. A claim that Dhyana Enterprises breached its contract with the Richard Green Group to ship the painting;
5. A claim of vicarious liability against Barridoff Galleries, alleging that each of the other defendants acted in agency to Barridoff Galleries;
6. A claim seeking to impose liability on Barridoff Galleries as a bailee of *The Sheik*; and
7. A claim seeking to impose liability on Barridoff Galleries as "a forwarder and/or carrier under applicable shipping law."

(Docket No. 33.)⁴ Each of the defendants contends that it is entitled to summary judgment based on the absence of any evidence in the record that it breached any duty of care and caused damage to *The Sheik*. Lloyds's response is puzzling. Although Lloyds did not pursue a cause of action against Federal Express, the entity that actually contracted with Lloyds to transport *The Sheik* overseas by air, Lloyds contends that its suit against Barridoff Galleries, Dhyana Enterprises and Earle W. Noyes is governed by the Warsaw Convention and, particularly, by a presumption in the Convention that damage to goods shipped by air was the result of an event which took place during air transportation. (Docket No. 94 at 7-9.) Because the Convention and the subject presumption can sometimes apply to a party to a contract for air transportation even though it is not the party actually transporting goods by air, see, e.g., Comm. Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448, 464-465 (2d Cir. 2003) (discussing the application of Article 18(3) of the Warsaw Convention and the circumstances under which land transportation can be subject to the Convention), Lloyds argues that all of the movement of *The Sheik* among Barridoff Galleries, Dhyana Enterprises and Earle W. Noyes was subject to the Convention, even though it all occurred prior to the execution of the Federal Express air waybill that was the contract for air transportation. (Docket No. 94 at 7-10.)

1. The Warsaw Convention does not apply to the defendants.

None of the cases cited by Lloyds support the contention that a party becomes subject to presumptive liability under the Warsaw Convention merely as a consequence of actions undertaken in order to consign goods with an air carrier. In fact, it is difficult to understand what relevance Lloyds's primary authority has to this case, if any. In Alitalia Airlines (referred to by

⁴ I am unaware of any legal rationale that would explain why Lloyds broke its claim against Barridoff Galleries into four separate counts (one each for negligence, bailment, agency and "applicable shipping law"). Nor am I aware of any reason why Lloyds's negligence claims against Dhyana Enterprises and Earle W. Noyes would be rendered insufficient merely because Lloyds failed to recite additional claims denominated as depending on the common law of bailments.

Lloyds as "Ilapak," the name of Commercial Union's subrogor in the case), the Second Circuit addressed whether land transportation undertaken by a Gava International Freight Consolidators, a freight forwarder, was "an instance of carriage incidental to the transportation by air within the meaning of Article 18(3)" of the Geneva Convention. 347 F.3d at 464. Gava had contracted with the plaintiff's subrogor, Ilapak, to transport a machine from Italy to the United States, and issued Ilapak an air waybill. Id. at 455. On its waybill Gava indicated that it was acting as an agent of Alitalia, the actual air carrier. Id. Alitalia's subsequently issued waybill likewise identified Gava as its agent and, as importantly, as the consignor of the machine. Id. at 455-56. At some point during shipment, Ilapak's machine was damaged. Id. at 456. Alitalia, the air carrier, argued that the presumption that damage occurred during air transportation could not apply because it was a case of combined carriage (Gava had carried the machine overland in both Italy and the United States) and because Alitalia's waybill did not provide for any land transportation. Id. at 465. The court disagreed, reasoning that the absence of a provision for ground transport on Alitalia's waybill did not prevent application of the liability presumption to Alitalia, the air carrier, because the land transport provided by Gava was contemplated by Alitalia. Id. at 465-66. The court also reasoned that when determining whether land transport is incidental to a contract for air carriage, reference must be made to the initial contract for air carriage signed by the original shipper (Ilapak). Id. at 466. Critically, Ilapak had signed a contract for air carriage (the air waybill) with Gava and, therefore, land transport done by Gava in performance of that contract was necessarily action contemplated by the contracting parties. Id. at 467. Finally, because Gava was undisputedly acting as an agent of Alitalia, Alitalia was necessarily party to this understanding. Id.

The instant case is readily distinguished from Alitalia. The only contract for air carriage existing in this case is the Federal Express air waybill. Quite obviously, there was no contract for air carriage between the Richard Green Group and Barridoff Galleries or between the Richard Green Group and Earle W. Noyes. Nor was there any contract for air carriage between the Richard Green Group and Dhyana Enterprises d/b/a Mail Boxes, Etc. The record reflects that the Richard Green Group made arrangements for Federal Express to pick up *The Sheik* from Mail Boxes, Etc. and for payment to Federal Express on account. In my assessment, the mere fact that Mail Boxes arranged for *The Sheik* to be crated and filled out portions of the air waybill is suggestive only of agency to the Richard Green Group, not to Federal Express. There is no evidence in this case that Mail Boxes, Etc., had the ability or authority to create a contract for air carriage on behalf of Federal Express. Nor is there any evidence that Mail Boxes, Etc., entered into a contract for air carriage in its own name. In the absence of such evidence, Lloyds fails to establish that the Warsaw Convention has anything to do with this litigation against Barridoff Galleries, Dhyana Enterprises and Earle W. Noyes. Indeed, although Lloyds cites a small handful of shipping cases, it fails to even explain why any of these defendants qualify for treatment as "carriers" at all.

2. *Dhyana Enterprises and Earle W. Noyes were not the agents of Barridoff Galleries.*

Lloyds argues that its case against Barridoff Galleries is "buttressed" because Dhyana Enterprises and Earle W. Noyes were acting as Barridoff Galleries's agents. (Docket No. 94 at 11.) Presumably, Lloyds seeks to buttress its case against Barridoff Galleries because *The Sheik* was delivered to Mail Boxes, Etc., unwrapped and unconcealed and Mr. Kurzmann testified that the painting was undamaged at that time. In support of its agency argument, Lloyds observed that Barridoff Galleries had a customary arrangement with Mail Boxes, Etc., and Earle W. Noyes

regarding the shipment of paintings. The fact that independent business entities frequently do business with one another pursuant to customary arrangements does not make one the agent of the other.

An agency is a fiduciary relationship "which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act." Perry v. H.O. Perry & Son Co., 1998 ME 131, ¶ 7, 711 A.2d 1303, 1305. An agency arises from an "agreement that one party will act on behalf of, and subject to the control of the other." Page v. Boone's Transp., Ltd., 1998 ME 105, ¶ 5, 710 A.2d 256, 257. "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries." Id. Consent and control are required elements. Id.

J & E Air, Inc. v. State Tax Assessor, 2001 ME 95, ¶ 14, 773 A.2d 452, 456. Although it is perhaps excusable for Lloyds to argue that Dhyana Enterprises d/b/a Mail Boxes, Etc., and Earle W. Noyes act as agents of Barridoff Galleries when it comes to assisting with the shipment of the paintings Barridoff Galleries sells at auction, it is ridiculous to suggest, as Lloyds does, that the existence of such a fiduciary relationship is "incontrovertible." (Docket No. 94 at 12.) There is nothing in the record to even suggest that Dhyana Enterprises, let alone Earle W. Noyes, agreed to act on behalf of or subject to the control of Barridoff Galleries.

3. The common law presumption of bailee negligence

It is well established that one who agrees to take custody and control of another's property by agreement to effectuate a specific purpose for the benefit of the other is a bailee with respect to the property and owes a duty of ordinary care until such time as the purpose is accomplished. Frost v. Chaplin Motor Co., 138 Me. 274, 277, 25 A.2 225, 226 (1942) (defining what "bailment" is). Although a bailee is not an insurer of the bailed property, there is a presumption in the common law that the bailee was negligent in caring for bailed property when it is consigned in an undamaged condition and returned in a damaged condition. Levasseur v. Field, 332 A.2d 765, 767 (Me. 1975). Maine law holds that the bailee may dispel the

presumption by providing "any explanation of loss or damage, or any showing that loss or damage occurred without fault," but that "[w]hether the bailee's conduct on the facts amounted to negligence would be a primary question for the factfinder." *Id.* at 768-69. In particular, "[a]ny explanation offered by the bailee in rebuttal of the presumption of negligence would ordinarily be subject to a jury determination as to credibility." *Id.*⁵

The defendants do not even dispute that they were bailees with respect to *The Sheik*. Instead, each of the defendants, or an employee or agent who handled the painting on its behalf, has testified that the painting was not damaged while in that defendant's care or custody. Given the nature of the presumption of negligence and the fact that the testimony offered by the defendant-movants is primarily in the nature of self-serving statements by interested witnesses that need not be credited at the summary judgment stage, it would appear that this case is not appropriate for brevis disposition, at least insofar as Dhyana Enterprises and Earle W. Noyes are concerned.

Dhyana Enterprises argues that a presumption of bailee negligence cannot arise in this case because there were successive bailees whose possession was not exclusive. (Docket No. 83 at 6.) However, the case principally relied on by Dhyana Enterprises involved extensive access to the bailed property by the bailor and turned on the particular nature of that access. See Goudy & Stevens, Inc. v. Cable Marine, Inc., 924 F.2d 16, 19 & n.3 (1st Cir. 1991) (recognizing that access by a bailor does not necessarily negate the presumption of bailee negligence, but agreeing with the trial court that the nature of the bailor's access negated the presumption of bailee negligence in that case). Earle W. Noyes makes a slightly different argument. According to Earle W. Noyes, there is a presumption in the law that the last in a line of successive bailees

⁵ The Law Court authored a more elaborate opinion concerning the impact of evidentiary presumptions in Hinds v. John Hancock Mutual Life Insurance Co., 155 Me. 349, 155 A.2d 721 (1959).

(here Federal Express) was the negligent party. (Docket No. 79 at 8.) The cases cited in support of this presumption, however, involve transshipments of goods in which the second or successive carrier issued a clean bill of lading to the prior carrier, which constitutes prima facie evidence that the carrier received the shipments in good condition. See, e.g., Madow Co. v. S.S. Liberty Exporter, 569 F.2d 1183 (2d Cir. 1978) (discussing the presumption that arises from a clean bill of lading under the Carriage of Goods by Sea Act, 46 USCS Appx. § 1303(4)). Whether the Federal Express air waybill was the equivalent of a clean bill of lading is not addressed by the defendants. Moreover, *The Sheik* was doubly concealed within both a wooden crate and paper wrapping when it came into the custody of Federal Express, which tends to undermine the rationale behind imposing liability on Federal Express simply based on its being the final bailee. See Nopco Chem. Div. v. Blaw-Knox Co., 281 A.2d 793, 796 (N.J. 1971) ("Blaw-Knox is not absolved by reason of having received a "clear receipt" from Central (nor is any other party in the chain who received a similar document), because the damage was concealed and not apparent."). In my view the facts of this case support a presumption that *The Sheik* was damaged while in the possession or control of either Dhyana Enterprises or Earle W. Noyes⁶ because *The Sheik* was consigned to Federal Express and delivered by Federal Express in an undamaged crate and, perhaps more importantly, wrapped in the same blue and tan Kraft paper that was first applied by either Mr. Kurzmann or Mr. Hurd. (See, supra, note 1.) Although the defendants argue that some packaging materials were missing, an equally plausible assessment of the record is that such materials were never in the crate. Mr. Hurd's testimony was merely that it was his practice to use a telescoping cardboard carton. A jury need not credit this self-serving testimony and it is inappropriate for the court to draw an inference on behalf of the movants at the summary

⁶ Nothing in the summary judgment papers suggests that the tear in *The Sheik* could have arisen through natural causes.

judgment stage. That the jury is the appropriate decision maker under these circumstances is suggested by Levasseur. 332 A.2d at 769 ("It [is] for the factfinder to determine whether the nonexistence of facts pointing to negligence was as probable as their existence; if the facts were not exculpatory or not consistent with due care, the presumption of bailee negligence would persist and would justify a verdict for the plaintiff-bailor."). Accordingly, summary judgment ought not enter on the claims against Dhyana Enterprises and Earle W. Noyes.

The evidence introduced by Barridoff Galleries in support of its motion for summary judgment is different in one significant regard. Barridoff Galleries relies on the deposition testimony of Mr. Kurzmann to the effect that *The Sheik* was undamaged when it arrived at Mail Boxes, Etc. (Docket No. 77, ¶ 34, citing id., Ex. B at 90.) With respect to Barridoff Galleries, Mr. Kurzmann's testimony is not self-serving. In an effort to persuade the court to disregard this testimony, Lloyds argues that Mr. Kurzmann's poor recollection of *The Sheik* undermines or impeaches his professed recollection of *The Sheik's* condition upon his receipt of it. Lloyds refers the court to a passage in the Kurzmann deposition transcript in which Mr. Kurzmann testified that he did not "remember the chain of events exactly" that caused Mail Boxes, Etc., to initially become "involved" in shipping *The Sheik*. (Docket No. 95, Attach. 6 at 24-25.) This testimony does not impeach Mr. Kurzmann's statement that the painting arrived undamaged at Mail Boxes, Etc. The fact that Mr. Kurzmann cannot remember exactly how Mail Boxes became "involved" in shipping the painting does not speak to his ability to recall the painting itself or its condition upon receipt. Because the record establishes that Barridoff Galleries delivered *The Sheik* undamaged to Mail Boxes, Etc., the presumption of bailee negligence does not operate against Barridoff Galleries and Barridoff Galleries is entitled to summary judgment.

Conclusion

For the reasons stated herein, I **DENY** Lloyds's motions to strike (Docket Nos. 100 & 101) and **RECOMMEND** that the court **GRANT** Barridoff Galleries's motion for summary judgment (Docket No. 76) and **DENY** the remaining defendants' motions for summary judgment (Docket Nos. 79 & 83).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: August 20, 2004

CERTAIN INTERESTED UNDERWRITERS AT
LLOYDS SUBSCRIBING TO POLICY WA003780Z v.
BARRIDOFF GALLERIES et al

Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:
Demand: \$140000
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 08/11/03
Jury Demand: Both
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

**CERTAIN INTERESTED
UNDERWRITERS AT LLOYDS
SUBSCRIBING TO POLICY**

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RICHARD GREEN GROUP

V.

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